

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3

4 UNITED STATES,

5 Plaintiff,

6 v.

7

8 DANIEL D. SMITH,

9 Defendant.

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11 No. CR-03-228-FVS

12

13 ORDER DENYING SECOND AMENDED
14 § 2255 MOTION

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16 **THIS MATTER** came before the Court pursuant to the defendant's
17 second amended motion to vacate, set aside or correct his sentence
18 pursuant to 28 U.S.C. § 2255, Ct. Rec. 35. The defendant is
19 proceeding *pro se*. The government is represented by Assistant United
20 States Attorney Ronald Skibbie. The Court has reviewed the entire
21 case file and is prepared to rule.

22

23 **BACKGROUND**

24

25 On March 9, 2004, the defendant pleaded guilty to the offense of
26 manufacturing 100 or more marijuana plants in violation of 21 U.S.C.
§ 841(a)(1). (Ct. Rec. 25, 26, 27). The Plea Agreement advised the
defendant he was facing a term of imprisonment of "not more than 40
years nor less than 5 years...." (Ct. Rec. 26). In the Plea
Agreement, the defendant also stipulated to the facts underlying his
conviction. (Ct. Rec. 26). At the time of sentencing, based on
facts admitted by the defendant in his Plea Agreement, the Court

1 sentenced the defendant to the statutory mandatory minimum sentence
2 of 60 months imprisonment pursuant to the provisions of 21 U.S.C.
3 § 841(a)(1).

4 The defendant did not appeal his sentence. He now moves to
5 vacate his sentence pursuant to 28 U.S.C. § 2255, Ct. Rec. 33. The
6 defendant also submitted an amended § 2255 motion, Ct. Rec. 34, and a
7 second amended § 2255 motion, Ct. Rec. 35. The Court previously
8 directed the government to respond to the defendant's second amended
9 § 2255 motion.

10 **DISCUSSION**

11 The defendant argues in his original § 2255 motion that his
12 sentence is unconstitutional pursuant to the United States Supreme
13 Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531, 159
14 L.Ed.2d 403 (2004). The defendant argues in his amended § 2255
15 motion that his sentence is also unconstitutional pursuant to *United*
16 *States v. Booker*, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Finally,
17 the defendant argues in his second amended § 2255 motion that he
18 received ineffective assistance of counsel.

19 *Blakely/Booker Arguments*

20 The defendant's claim that his statutory imposed mandatory
21 minimum sentence is unconstitutional in light of the Supreme Court's
22 rulings in *Blakely v. Washington*, 124 S.Ct. 2531, 159 L.Ed.2d 403
23 (2004), and *United States v. Booker*, 125 S.Ct. 738, 160 L.Ed.2d 621
24 (2005), fails for two reasons.

25 First, the rule announced by *Blakely* is procedural rather than
26 substantive, and under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060,

1 103 L.Ed.2d 334 (1989), the *Blakely/Booker* rule constitutes a new
 2 rule that does not apply retroactively to cases, such as the
 3 defendant's, that were final when *Blakely* was decided. See, e.g.,
 4 *United States v. Price*, 400 F.3d 844 (10th Cir. 2005); see also *Cook*
 5 *v. United States*, 386 F.3d 949 (9th Cir. 2004) (noting that *Blakely*
 6 is not retroactive to cases on collateral appeal).

7 Second, even if the *Blakely/Booker* rule did apply retroactively
 8 to the defendant's case, *Booker* has no impact on the defendant's
 9 sentence because his sentence was not based upon an application of
 10 the United States Sentencing Guidelines but rather upon the mandatory
 11 minimum sentence set forth in 21 U.S.C. § 841(a)(1). See *United*
 12 *States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005) (stating that
 13 "*Booker* does not bear on mandatory minimums"); see e.g., *United*
 14 *States v. Antonakopoulos*, 399 F.3d 68, 76 (1st Cir. 2005) (stating
 15 that there is no *Booker* argument if the sentence imposed was a
 16 statutory mandatory minimum sentence resulting from facts found by a
 17 jury or admitted by the defendant); *United States v. Lee*, 399 F.3d
 18 864, 866 (7th Cir. 2005) (stating that "[n]othing in *Booker* gives a
 19 judge any discretion to disregard a mandatory minimum" statutory
 20 sentence); *United States v. Rojas-Coria*, 401 F.3d 871, 874 n.4 (8th
 21 Cir. 2005) (noting that *Booker* has no impact on a case where the
 22 defendant is sentenced pursuant to a statutory mandatory minimum
 23 rather than pursuant to an application of the Sentencing Guidelines).

24 *Ineffective Assistance of Counsel*

25 The defendant claims his counsel was ineffective because his
 26 attorney "failed/refused to investigate the facts, and research the

1 case, as well as object to drug type, and drug quantity ... which
2 were judge-made findings, in violation of Booker & Blakely." In
3 reviewing a claim of ineffective assistance of counsel, the Court
4 applies a two-part test: "First, the defendant must show that
5 counsel's performance was deficient. Second, the defendant must show
6 that the deficient performance prejudiced the defense. This requires
7 showing that counsel's errors were so serious as to deprive the
8 defendant of a fair trial." *United States v. Recio*, 371 F.3d 1093,
9 1109 (9th Cir. 2004) (quoting *Strickland v. Washington*, 466 U.S. 668,
10 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under the first
11 element, the Court must examine "whether counsel's assistance was
12 reasonable considering all the circumstances." *Strickland*, 466 U.S.
13 at 688, 104 S.Ct. 2052. This requires the Court to analyze counsel's
14 performance with some deference, as "counsel is strongly presumed to
15 have rendered adequate assistance and made all significant decisions
16 in the exercise of reasonable professional judgment." *Id.* at 690,
17 104 S.Ct. 2052. Counsel's performance is not ineffective unless it
18 fails to meet an objective standard of reasonableness under
19 prevailing professional norms. *Id.* at 688, 104 S.Ct. 2052.

20 The Court determines that the defendant cannot show that
21 counsel's performance at sentencing was objectively unreasonable.
22 Since the Court determined above that neither *Blakely* nor *Booker* are
23 applicable to the defendant, the defendant has not suffered any
24 prejudice. Therefore, the defendant's claim for ineffective
25 assistance of counsel is without merit. Accordingly,

26 **IT IS HEREBY ORDERED** that the defendant's Second Amended Motion

to Vacate, Set Aside or Correct his Sentence under 28 U.S.C. § 2255,
Ct. Rec. 35, is DENIED.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this Order and furnish a copy to the **defendant**.

DATED this 27th day of June, 2005.

s/ Fred Van Sickle
Fred Van Sickle
Chief United States District Judge